

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



*w/affidavit*

**75-7524**

To be argued by  
STUART I. PARKER

*B*

*P/S*

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 75-7524**

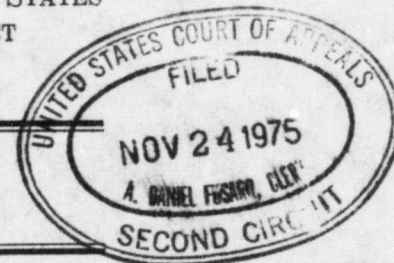
JOSEPH A. DENISE,  
*Plaintiff-Appellant,*

—v.—

C. V. ROWLAND, individually and as Area Postmaster  
General of the United States Postal Service, New  
York Metro Region,  
*Defendant-Appellee.*

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT  
OF NEW YORK

**BRIEF FOR DEFENDANT-APPELLEE**



THOMAS J. CAHILL,  
*United States Attorney for the  
Southern District of New York,  
Attorney for Defendant-Appellee.*

STUART I. PARKER,  
STEVEN J. GLASSMAN,  
*Assistant United States Attorneys,  
Of Counsel.*

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 75-7524

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JOSEPH A. DENISE,

Plaintiff-Appellant,

-v-

C. V. ROWLAND, individually and  
as Area Postmaster General of the  
United States Postal Service,  
New York Metro Region,

Defendant-Appellee.

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On Appeal from a Judgment of the United States  
District Court for the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLEE

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Preliminary Statement

Plaintiff-Appellant, Joseph A. DeNise, a clerk  
employed by the United States Postal Service, appeals to  
this Court from a final judgment, dated May 22, 1975,



dismissing his complaint. The complaint seeks a judgment ordering DeNise enrolled in the Postal Service's Management Trainee Program and awarding him monetary damages. In a decision dated February 20, 1975, Judge Griesa treated a motion by defendant-appellee, C. V. Rowland, to dismiss the complaint as one for summary judgment and granted summary judgment dismissing the complaint.

Issues Presented

1. Did the District Court properly grant Rowland summary judgment?
2. Did the District Court lack jurisdiction over the subject matter of DeNise's complaint?

Statement of the Case

DeNise's complaint was filed January 11, 1974 and duly answered March 21, 1974. On August 26, 1974 Rowland moved to dismiss the complaint on the grounds that it failed to state a claim upon which relief can be granted and the Court lacked subject matter jurisdiction over the complaint. An affidavit sworn to by George B. Haburay, the Special Programs Administrator in charge of the Management Trainee Program for the Northeast Region of the United States Postal Service, was submitted in support of Rowland's motion.\* DeNise submitted a "supplementary affidavit," to which he makes

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\* Haburay's affidavit is in the addendum to this brief.

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reference in his brief, in opposition to the motion. His affidavit does not dispute any of the material facts set out in Haburay's affidavit and restated in Judge Griesa's opinion.

In granting Rowland summary judgment dismissing the complaint, Judge Griesa did not reach the issue of whether there was subject matter jurisdiction over the complaint.

#### Statement of Facts

The material facts concerning DeNise's claim that the Postal Service denied him an opportunity to enroll in its Management Trainee Program are undisputed.

The Management Trainee Program was offered to provide promotional opportunities to postal employees. In order to gain admission to the program, a postal employee had to successfully participate in a multi-step selection process.

The first phase of the selection process was a written examination for which the passing grade was 70%. DeNise scored 91% on this examination. When an individual passed the written examination, a Performance/Potential Rating was prepared on him by his immediate supervisor. The supervisory ratings were graded, with 70% being a passing grade.

The next phase of the selection process consisted



of Group Discussion Panels and an interview. Although DeNise's supervisory rating was 66%, he was invited to participate in this phase and informed that his supervisory rating would have no bearing on the final outcome of the selection process. DeNise was extended this invitation because the Postal Service had decided that anyone with a grade of 90% or better on the written examination should be eligible for the Group Discussion Panel phase of the selection process, regardless of their supervisory rating.

DeNise refused to attend a Group Discussion Panel and accordingly was eliminated from further consideration for entrance into the Management Trainee Program. Final selection for the program was made from the group of candidates who successfully participated in Group Discussion Panels.

#### ARGUMENT

##### Point I

#### SUMMARY JUDGMENT WAS APPROPRIATE

The undisputed facts in this case show that DeNise's claim that he was denied an opportunity to enroll in the Postal Service's Management Trainee Program is simply not true. Rather, as Judge Griesa concluded on the undisputed facts at page 4 of his decision, "plaintiff himself was entirely responsible for his failure to go forward in the Management Trainee Program."

The only phases of the selection process for the Management Trainee Program which DeNise completed were the written examination and the supervisory rating. The purpose of these phases was to narrow the number of candidates to be considered in the next phase of the selection process, the Group Discussion Panel. Final selection for the program was made from those candidates who successfully participated in that phase.

DeNise was invited to participate in a Group Discussion Panel and, in that connection, was informed that his supervisory rating would have no bearing on the final outcome of the selection process. Nevertheless, he refused to attend such a panel.\* In short, it was DeNise's decision and not that of the Postal Service which led to his being eliminated from further consideration for the Management Trainee Program.

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\* From his brief, it appears that DeNise's reason for refusing to attend the Group Panel Discussion was that he believed he would not be judged fairly because of his supervisory rating. Had DeNise attended a panel and thereafter been rejected because of his supervisory rating, his allegations might have some relevance. Here they are irrelevant, particularly in view of the undisputed fact that DeNise was informed that his supervisory rating would have no bearing on the final outcome of the selection process.



As there is no genuine issue as to any material fact to be tried, summary judgment was appropriate. Rule 56, Federal Rules of Civil Procedure. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90 (1968); Heyman v. Commerce and Industry Ins. Co., \_\_\_\_ F.2d \_\_\_\_, Docket No. 75-7230 (2d Cir., October 24, 1975).

Point II

THERE IS NO JURISDICTION  
TO CONSIDER THE SUBJECT  
MATTER OF THE COMPLAINT

While Congress has permitted suits against the United States Postal Service, 39 U.S.C. §409, there must still be a basis for subject matter jurisdiction in the court in which the lawsuit is filed. DeNise claims such jurisdiction in the instant case on the basis of 5 U.S.C. §701 et. seq. and 28 U.S.C. §1361. These claims are completely without merit.

First, jurisdiction under 5 U.S.C. §701 et seq. is barred by section 410 of the Postal Reorganization Act, 39 U.S.C. §410(a), which provides in pertinent part:

. . . no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets or funds, including the provisions of Chapters 5 and 7 of Title 5, shall apply to the exercise of the powers of the Postal Service. (emphasis added).

Since DeNise complains of the exercise of the powers of the Postal Service, this prohibition against jurisdiction under 5 U.S.C. §701 et seq. is fully applicable here. See Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378, 383 (2d Cir. 1975).

Secondly, DeNise's claim of mandamus jurisdiction also fails. Mandamus relief "is appropriate only to review ministerial acts which are subject to positive command, plainly described and free from doubt." Fifth Avenue Peace Parade Committee v. Hoover, 327 F. Supp. 238, 242 (S.D.N.Y. 1971), aff'd, 480 F.2d 326 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974). There must be "some specific statutes or regulations against which to measure the duties said to have been specifically ignored by the defendant . . .," id., at 243, because a "Court cannot, pursuant to its mandamus jurisdiction, 'direct the exercise of judgment or discretion in a particular way' . . ." Casarino v. United States, 431 F.2d 775, 777 (2d Cir. 1970), quoting Wilbur v. United States, 281 U.S. 206, 218 (1930).

In the case at bar, the provisions of 39 U.S.C. §1004 notwithstanding, the Postal Service's discretionary authority to hire and promote employees was specifically delegated by Congress: "the Postal Service shall have the right . . . to hire, promote, transfer, assign, and retain



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officers and employees in positions within the Postal Service, and to suspend, demote, discharge, or take other disciplinary action against such officers and employees." 39 U.S.C. §1001(e)(2).

CONCLUSION

The judgment appealed from, granting summary judgment dismissing the complaint, should be affirmed.

Dated; New York, New York

November, 1975

Respectfully submitted,

THOMAS J. CAHILL  
United States Attorney for the  
Southern District of New York  
Attorney for defendant-appellee

STUART I. PARKER  
STEVEN J. GLASSMAN  
Assistant United States Attorneys

-Of Counsel-

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ADDENDUM

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
JOSEPH A. DE NYSE,

Plaintiff,

- v -

C. V. ROWLAND,

Defendant.

:  
:  
:  
: AFFIDAVIT

: 74 Civ. 218 (LPG)

-----x  
COUNTY OF NEW YORK )  
STATE OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK)

GEORGE P. HABURAY, being duly sworn, deposes and  
says:

1. I was the Special Programs Administrator, North-  
east Region, U.S. Postal Service from October, 1971, to  
August, 1974, and was in charge of the Management Trainee  
Program for the Northeast Region of the U.S. Postal Service.

2. On January 13, 1973, plaintiff Joseph DeNise,  
along with approximately 1100 other applicants, took a  
written examination for placement in the Postal Service  
Management Trainee Program which was designed to provide  
promotional opportunities. He achieved a score of 91% on  
this test. Approximately 400 people passed the test with  
a score of 70% or above.

3. When an individual passed the examination, his  
immediate supervisor was requested to fill out a Performance/  
Potential Rating for the employee. The ratings were given  
a numerical value, and 70% was a passing grade. Passing  
this phase enabled an applicant to enter the next phase  
which consisted of Group Discussion Panels and an inter-  
view. Mr. DeNise scored a 66 on this portion of the pro-  
cedures.



4. Whereas ordinarily a 66 would have disqualified a candidate from proceeding further, it was decided that anyone scoring 90% or more on the written portion of the test would be invited to the next step, the Group Discussion Panels, regardless of their supervisory ratings. Mr. DeNise was notified that he was eligible for the Group Discussion phase of the testing and that his supervisory rating was only an initial step and would have no bearing on the final outcome of the selection process.

5. Approximately 200 candidates were interviewed in the Group Discussion Panels. Mr. DeNise was notified that he was scheduled to attend a Group Discussion Panel on May 10, 1973, but did not appear. No excuse for his absence was ever given. For this reason, Mr. DeNise was eliminated from further consideration.

6. Approximately 80 candidates were successful in passing the Group Discussion Panels in the Northeast Region. All were placed on a list of highly qualified candidates, and their names were sent to the Postmaster of each office involved, who then chose a specified number of candidates to participate. Of these 80 candidates, only 30 were eventually selected by their Postmasters to participate in the program.

7. Of the 80 candidates, 28 were eligible in the Manhattan-Bronx Post Offices, where Mr. DeNise's name would have been sent, had he taken and passed the Group Discussion Panel. Only 4 candidates were chosen there, and one of these received only a 38 on his Supervisory rating.

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8. As described above, a high passing score on the written exam had no ultimate bearing on whether a candidate was eventually chosen for the Management Trainee Program. It merely entitled the individual to go on to the next steps. Similarly, Mr. DeNise's score on the supervisory rating would have had no bearing on his final selection, since he, along with others similarly situated, was invited to proceed to the next step. As pointed out above, one person with a lower supervisory rating than Mr. DeNise was chosen for the Management Trainee Program for the Manhattan-Bronx post offices.

WHEREFORE, your deponent prays that defendant's motion to dismiss the complaint be granted in all respects.

15/  
\_\_\_\_\_  
GEORGE P. HARURAY

Sworn to before me this

21 day of January, 1975.

\_\_\_\_\_  
Notary Public

NEW YORK  
Notary Public  
JAN 24 1975



AFFIDAVIT OF MAILING

CA 75-7524

State of New York     )  
County of New York    )

Pauline P. Troia,                   being duly sworn,  
deposes and says that she is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the 24th day of  
November 19 75 he served 2 copies of the within  
govt's brief

by placing the same in a properly postpaid franked envelope  
addressed:

~~XXXXXXXXXXXXXXXXXXXX~~  
~~XXXXXXXXXXXX~~  
~~XXXXXXXXXXXX~~

Mr. Joseph A. Denise,  
1010 Soundview Ave.  
Bronx, NY 10472

And deponent further says  
she sealed the said envelope and placed the same in the  
mail ~~box~~ drop for mailing in the United States Courthouse, Annex,  
~~Police Square~~ ~~XXXXXX~~ Borough of Manhattan, City of New York.  
One St. Andrews Plaza

Pauline P. Troia

Sworn to before me this

24th day of November 19 75

Lawrence Mason

LAWRENCE MASON  
Notary Public, State of New York  
No. 03-2572560  
Qualified in Bronx County  
Commission Expires March 30, 1977